



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 16 OF 2012

NICHOLAS KIMUTAI CHERUIYOT & 5 OTHERSPLAINTIFFS

VERSUS

KENYA FOREST SERVICE1ST RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF

FORESTRY AND WILDLIFE2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

JUDGEMENT

(Petition for protection of property; petitioners claiming to have titles to certain land and alleging interference by respondents; the parcels of land falling in Likia area; already decided in a previous petition that the titles were irregularly acquired and an offer of compensation made; given the previous decision, the prayers by the petitioners cannot be allowed; petition dismissed)

1. This petition was filed on 2 May 2012. The petitioners are 6 persons who reside in Chepkisia within Nakuru County and who have filed this petition on behalf of about 29 others. The petitioners aver to be the legal proprietors of 36 land parcels situated in Nakuru/Likia extension and that they hold title deeds and have been in occupation since the year 1997. They claim that without any justification, the respondents have forcefully entered their land and started wasting their property. It is contended that the respondents are demarcating and surveying the petitioners' private property without affording them audience, or serving any requisite notices or payment of any compensation. In this petition, the petitioners have asked for the following orders (slightly paraphrased owing to obvious typographical errors) :-

(a) A declaration that the respondents' entry or intended entry into the petitioners' private property is unconstitutional and contravenes Article 40 of the Constitution of the Republic of Kenya and therefore illegal.

(b) A conservatory order to restrain the respondents, any authority or person legal or otherwise from interfering in any manner whatsoever with the ownership, possession, use and or occupation of parcels Nakuru/Likia/1268-1337.

(c) That the petitioners be paid damages for breach of their constitutional rights.

(d) *That the petitioners be granted costs.*

2. The supporting affidavit is sworn by Nicholas Kimutai Cheruiyot, the 1st petitioner. He has deposed that he is an occupant of the land parcel Nakuru/Likia/1313 and has annexed a title deed to this parcel of land which bears his name. He has stated that the other petitioners are also resident of land forming part of 36 parcels in Nakuru/Likia extension and he has annexed some title deeds and a map showing the extension. He has explained that the extension comprises of Chepkesia Primary School with over 500 students and that they have extensively developed their properties. It is claimed that on or about the 23 April 2012, officers of the 1st respondent, the Kenya Forest Service, without any justification whatsoever, entered the parcels of land with a view of taking possession. It is contended that they did enter the parcel numbers Nakuru/Likia/1309, 1310, 1312, 1329, 1330, and 1331 and destroyed the petitioners' crops. It is deposed that the OCS Likia and OCPD Njoro, intervened thereby halting the encroachment following a directive of the District Officer, Mauche Division. It is averred that this entry is illegal and a breach of the rights of the petitioners to own property and that the parcels of land do not form part of the Mau Forest. A supplementary affidavit was filed on 16 May 2012 annexing more title deeds.

3. The 1st respondent filed a Replying Affidavit sworn by Inspector Nancy Maina. She is in charge of investigation and prosecution of all cases related to environmental conservation in the whole of Mau Forest. She has pointed out that only about 6 pieces of title deeds are annexed, yet the petition is said to be brought on behalf of 59 persons. She has doubted the ownership of these parcels of land as no official search certificates are annexed. She has averred that the issue of removal of the petitioners was arbitrated in Nakuru Misc. Application No. 60 of 2011 and the petitioners advised to seek compensation. The reason that they were removed is that they were allegedly allocated land in 1997 yet excision of the forest was done in the year 2001. A copy of Legal Notice No.142 was annexed. Following the legal notice, several organizations went to court vide Nairobi High Court Misc Application No. 421 of 2002 and a court order issued. It is claimed that the title deeds are illegal products of disobedience of court orders. It is contended that the petitioners occupy illegal extensions of the Mau Forest and that Article 40 of the Constitution does not protect illegally acquired property. It is deposed that the greater public interest requires conservation of the environment for present and future generations.

4. No documents were filed on behalf of the 2nd and 3rd respondents.

5. In his submissions, counsel for the petitioners submitted inter alia the petitioners have title which is indefeasible under the law. He submitted that in this case, there was no process engaged to validate the actions of the respondents and that the petitioners are the legal and legitimate proprietors of the land parcels Nakuru/Likia/1268-1337. He submitted that the land of the petitioners does not form part of the Mau Forest. He submitted that Article 40 of the Constitution protects the right to property and Article 47 provides the right to fair administrative action. He submitted that any acquisition of the land by the Government must follow proper procedure and there be compensation. He submitted that the task force on restoration of the Mau Forest Complex recommended that the inhabitants with titles be resettled in other places but the respondents' actions are contrary to these recommendations. He asserted that there was breach of the rules of natural justice and fair administrative action in failing to follow the proper statutory procedures for compulsory acquisition. He submitted that the petitioners are entitled to all the prayers sought and asked for damages of Kshs. 5,000,000/= as general damages. Counsel relied on various authorities to buttress his position.

6. On the part of the 1st respondent, it was submitted inter alia that the titles of the petitioners could not have been obtained legally. It was submitted that the suit properties were part of the Mau Forest as at the year 1997 before the Gazette Notice of 2001. Counsel submitted that titles could not have been issued before gazettelement. He submitted further that it is not enough for the petitioners to have title deeds and pointed out that the petitioners have not displayed any register or Green Card to prove ownership. He submitted that forest land is important land that needs to be protected. He submitted that the petitioners acquired the land illegally and their titles cannot be protected.

7. I have considered the matter. I do note that there had been a more or less similar case, filed as ***Petition No. 42 of 2013, Clement Kipchirchir & 38 Others vs Principal Secretary, Ministry of Lands, Housing***

and Urban Development. The titles in issue therein were of Nakuru/Likia just as is the case in this suit. In the said matter, I did hold that the titles therein were issued illegally and could not be protected. The reason why it was held that the titles were issued illegally is because the parcels of land in Nakuru/Likia, used to be part of the Mau Forest; the titles were issued in the year 1997 yet the forest was degazetted on 8 October 2001 vide Legal Notice No. 142 of 2001. I did hold in that case, that since the titles were issued before degazettment of the forest, the titles were irregularly issued and could not be afforded the protection of Article 40 of the Constitution, which protects the right to property. The reason why the titles were excluded from protection is because Article 40 (6) of the Constitution, provides that titles which are irregularly issued cannot be protected by Article 40 of the Constitution. The question therefore of whether the titles issued herein are valid or not, is a matter that has already been decided and is res judicata. Given the above, I am unable to therefore make any declaration that there has been any violation of the rights of the petitioners.

8. In the other suit, there had been an offer of compensation of Kshs. 400,000/= per person. Probably the parties herein can consider the same offer of compensation as had been made before. But I am unable to give the declarations and orders sought by the petitioners in this petition given my decision in Petition No. 42 of 2013. For that reason, the petition herein is dismissed. However, I make no orders as to costs.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 12th day of October 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Kahigah for the petitioners

No appearance for the respondents

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU